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No. 80-327

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VALLEY FORGE CHRISTIAN COLLEGE, *Petitioner,*

and

THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE UNITED STATES OF AMERICA,

v.

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, INC., ANDREW LEIGH GUNN, EDWARD E. DOERR, GIOELE SETTEMBRINI, and E. MALLARY BINNS, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals misinterpreted the law of standing when it granted standing to Respondents to challenge, under the Establishment Clause of the First Amendment, a government transfer to a Bible College of property worth more than one million dollars.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The opinion of the court of appeals is reported at 619 F.2d 252 and is printed in the appendix to the petition at A. 1 — A. 41.

SUMMARY

Respondents contend that the court of appeals' majority opinion and concurring opinion correctly applied the law of standing as developed in the several opinions of this Court.

Factually this suit contends that the United States of America, through its Department of Health, Education and Welfare, has granted to a Bible college, which is facially pervasively sectarian, real estate consisting of seventy-seven acres of land with some seventy buildings and personal property of such quantity and completeness as to make the transfer a "turn key" transfer of real and personal property. The value of the property was set by the government at $1,307,730.00 at the time of the transfer.

Respondents claim that the granting of the property from the United States government to the college under the authority of the Federal Property and Administration Services Act of 1949 is a clear violation of the Establishment Clause of the United States Constitution since the college was so sectarian that the benefits which it received from the government necessarily advanced a religious function.

In addition the transfer arrangement used by the government to effectuate the "gift" of government property to the Bible college would create excessive governmental entangelement which this Court has found to violate the religion clauses of the First Amendment.

Also Respondents contend that when the United States government, acting through HEW, gave a "100% benefit allowance" to the college it, in effect, was a purchase by the government of sectarian education designed only to benefit "born again Christians" and fashioned "to train leaders for church-related ministries." Thus such a purchase by the government would be a direct violation of the Establishment Clause of the First Amendment.

If instead of a grant of property HEW had made a gift to a Bible college using the "coin of the realm," there would be clear violation of the prohibition contained in the

Establishment Clause. To permit the gift of brick and mortar, Chapels and classrooms designed for religious teachings and of tape recorders and projectors to teach religious dogma should be just as clear a violation. Respondents claim that they should have just as much standing to challenge the latter as the former because the interests of the Respondents in the one would be no different than the other.

The constitutional "injury in fact" complained of by the Respondents gives them a sufficient "personal stake in the outcome" to assure a complete perspective of the issues involved. The interest which Respondents assert and seek to safeguard is also within the zone of interests protected by the Establishment Clause. Respondents do not advance an abstract or generalized complaint but set forth a particular and concrete injury that is protected by the constitutional guarantee raised.

STATEMENT OF THE CASE

Northwest Bible College, now known as Valley Forge Christian College, the Petitioner in these proceedings, on April 26, 1976 adopted a resolution authorizing the college to apply to the federal Secretary of Health, Education and Welfare (HEW) to secure certain real property owned by the United States in Chester County, Pennsylvania. The property in question had been declared surplus and was subject to disposal for educational or public-health purposes by the Secretary of Health, Education and Welfare under the provisions of the Federal Property and Administrative Services Act of 1949, as amended and rules and regulations promulgated thereunder. (App. p. 247)* The application of the Bible college also requested that "all furnishings now in the above building, such as beds, chairs, sofas, lamps, desks, dressers,

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* Page references (App. p. _____) are to the Appendix filed with the Third Circuit Court of Appeals. Page references (A. _____) are to the Appendix to the Petition for Writ of Certiorari.

files, laboratory instruments and equipment, and etc., remain with the property for the overall use of the college." (App. pp. 255 & 256).

On or about August 3, 1976 a quit claim deed was executed by and between the United States of America and the Northwest Bible College. The deed recited that the Bible college had made a firm offer to "purchase the property" for one hundred percent (100%) public benefit allowance." (App. p. 262). The deed recited that the value of the real estate was $577,500 (App. p. 276).

The real estate consisted of three parcels totaling 70 acres upon which stood 77 buildings. The deed contained certain conditions subsequent specifically requiring the Bible college to file reports on the operation and maintenance of the property and "such other pertinent data evidencing continuous use of the property for the purpose specified in the property application." The deed also contains a reverter clause. (App. p. 262-275).

On the same date as the execution of the deed, the Secretary of HEW executed a bill of sale whereby personal property with an agreed-upon fair-market value of $730,230 was "sold" and transferred to the college. (App. p. 276). The bill of sale provided that "the benefit which will accrue to the United States from the use of said property. . .is one hundred percent (100%) of the aforesaid fair value and in consideration thereof the purchaser has been granted a public benefit allowance of that percent of the aforesaid fair value." (App. p. 276).

The cost of government acquisition of the 181.43 acre total parcel of property, of which the property in question is a part, in 1942 was $41,553.00. Government appropriations for improvements to the property from 1942 to June of 1973 totalled $13,046,048.00. Thus, the total taxpayer investment was $13,087,601.00. (App. p. 237). The acquisition cost for the portion of the property transferred to the college totaled $10,374,386.00. (App. p. 203).

The purpose of Valley Forge Christian College has been stated by college President Obie L. Harrup, Sr. to be "to offer a systematic training at the collegiate level to men and women for Christian service as either ministers or laymen." (App. p. 39). According to President Harrup, "The college seeks to provide a living and learning experience in the Judaic-Christian tradition. . . ." (App. p. 39). The Bible college bulletin states: "The *primary* purpose of Valley Forge Christian College is to train leaders for church related ministries." (App. p. 84).

The Bible college describes itself as "basically a school for training those who expect to enter some form of Christian service, the motivation of the prospective student is of prime importance." (App. p. 77).

Resident students must have a "born again experience and be of good moral character. Those who have not experienced the Baptism in the Holy Spirit will be encouraged to seek and receive this experience." (App. p. 77).

The Bible college asks prospective students when and where they were converted; whether they have backslidden since being converted and, if so when they have been baptized in the Holy Spirit according to Acts 2:4; what church they attend; and whether they are members of a church. (App. p. 45).

The daily highlight of the Bible college is the Chapel service. "The spiritual tone of the College is maintained as students meet God in worship and enjoy the anointed ministry of the Word by the faculty , visiting ministers, and senior class members. As the Holy Spirit moves upon these services, ample time is made in the schedule for waiting on the Lord. *Attendance is required.*" (Emphasis added.) (App. p. 68).

The Christian Service Department of the Bible college *requires each student* to participate in Christian activities each term. The entire student body is organized into "The Student Missionary Society." (App. p. 68). Each student is given a minimum of thirty-five (35) assignments which *must* be

satisfactorily completed before the student can graduate. "These assignments include a variety of ministries, selected by the Director of Christrian Service . . .Experiences may be provided in the areas of Bible clubs, canvassing, street meetings, junior churches, young peoples' meetings, teaching in Sunday School, services in jails and old folks' homes, and in song leading and preaching in church services." (App. p. 80).

Departure from the school's standards will result in Christian counseling and when necessary "appropriate discipline will be administered in the hope of helping the student develop a mature Christian character." (App. p. 69).

The college maintains a special discount policy which grants: (1) a ten percent (10%) discount on tuition to the wife and children of a pastor or a full-time evangelist, and (2) a twenty-five percent (25%) discount on tuition to ordained ministers. (App. p. 75).

The only four-year degrees available at the Bible college are; the Ministerial Program, especially prepared for those who wish to prepare themselves for pastoral or evangelistic ministries (App. p. 85); the Missionary Program, especially developed for those who wish to prepare themselves for home or foreign missionary ministries (App. p. 86); and the Christian Education Program, especially designed for those who wish to enter the teaching ministries of the church. (App. p. 87). The only three-year certificate programs available are an abbreviated Ministerial Program concentrating on pastoral aspects of the ministry (App. p. 88); a shortened Missionary Program providing basic skills for missionary service (App. p. 89); a limited Christian Education Program providing basic teaching methodology for ministries within local churches (App. p. 90); and a Bible Concentration Program designed to give a thorough and practical knowledged of the *Bible.* (App. p. 91). A one-year Certificate Program is designed primarily for those desiring personal enrichment in Bible and theology, especially Sunday School teachers, Bible-study group leaders,

youth-group leaders, and "other persons in local church leadership positions." (App. p. 91).

The general requirements for graduation include: (1) soundness in doctrine, (2) acceptable deportment and regular attendance in Chapel, and (3) evidence of development and dependability in the required thirty-five (35) Christian Service assignments. (App. p. 81).

All members of the Board of Regents of the Bible college are affiliated with the Assemblies of God and most, if not all, are ministers. (App. pp. 40, 41). The Board consists of four members from each participating district of the Assemblies of God. They are chosen by their respective district presbyteries. The Executive Director of the Department of Education of the Assembly of God, the President of the college, and an executive officer of the Alumni Association are members of the Board of Regents by virtue of their offices. (App. p. 41).

The college requires its faculty members "to have been baptized in the Holy Spirit and be living consistent Christian lives." (App. p. 43). All members of the college administration are affiliated with the Assemblies of God. (App. p. 41).

Respondents Americans United for Separation of Church and State, Inc., a nonprofit, tax-exempt organization claiming a membership of 90,000 nationwide and four of its individual staff members who are citizens and taxpayers of the United States, challenged HEW's transfer of government property to the Bible college. The stated purpose of Americans United is to defend, maintain, and promote religious liberty and the principle of separation of church and state. (App. p. 164). Americans United claims that each of its members will be affected just as though each were a separate individual in this action.

Respondents claimed that this property transfer constituted a violation of their individual rights protected by the Establishment Clause of the First Amendment and sought declaratory and injunctive relief to void the transfer. On Petitioners' motions, the district court dismissed the suit on the

ground that Respondents lacked standing as taxpayers to challenge a transfer of property pursuant to the Federal Property and Administrative Services Act.

Respondents appealed to the United States Court of Appeals for the Third Circuit, which by a vote of two to one reversed the District Court on April 8, 1980 and remanded the case for trial on the merits. The appeals court denied Petitioner's request for a rehearing *en banc*. Petitioner now seeks a Writ of Certiorari.

REASON FOR DENYING THE WRIT

The constitutional 'injury in fact' complained of by the Plaintiffs here gives them a sufficient 'personal stake in the outcome' to assure a complete perspective of the issues involved. And. . .the interest which the Plaintiffs assert and seek to safeguard here is within the zone of interests protected by the Establishment Clause. Opinion of the Court, Adams, Circuit Judge, *Americans United, Etc.* v. *U.S. Dept. of H.E.W.* 619 F. 2d 252, 266 (3d Cir. 1980). (A. 2).

THE JUDGMENT OF THE THIRD CIRCUIT IS CONSISTENT WITH THE TEACHINGS OF THIS COURT ON THE QUESTION OF STANDING AND DOES NOT CONFLICT WITH HOLDINGS OF OTHER CIRCUITS ON THE PRECISE ISSUE

The appeals court opinion carefully reviewed the law of standing as set forth in the several opinions of this Court and correctly applied it in the context of the type of question to be adjudicated. The court of appeals clearly did not repudiate *Flast* v. *Cohen,* 392 U.S. 83 (1968). The court, however, recognized that in *Flast* this Court only dealt with the question of standing from the standpoint of whether a federal taxpayer is without standing to challenge the constitutionality of a federal statute. *Id.* at 85.[1]

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[1] Mr. Justice Stewart, in his concurring opinion in *Flast* v. *Cohen, supra* at 114 wrote:

> I join the judgment and opinion of the Court, which I understand to hold only that a federal taxpayer has standing to assert

Petitioner apparently believes that the Establishment Clause limits only the taxing and spending powers of the government, that a violation of the Establishment Clause may only be challenged by a taxpayer and that *Flast* is the only Supreme Court decision dealing with the question of standing when the challenged governmental action involves the Establishment Clause of the First Amendment

This Court in *Flast* indicated that the challenge there rested solely on Plaintiff's "status as federal taxpayers." *Id.* at 85.[2] It held that "[t]he Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exer-

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that a specific expenditure of federal funds violates the Establishment Clause of the First Amendment. Because that clause plainly prohibits taxing and spending in aid of religion, every taxpayer can claim a personal constitutional right not to be taxed for support of a religious institution. The present case is thus readily distinguished from *Frothingham* v. *Mellon*, 262 U.S. 447, where the taxpayer did not rely on an explicit constitutional prohibition but instead questioned the scope of the powers delegated to the national legislature by Article I of the Constitution. *Flast* v. *Cohen*, supra at 114.

[2] The Majority in *Flast, supra* at 101 wrote:

> The various rules of standing applied by federal courts have not been developed in the abstract. Rather, they have been fashioned with specific reference to the status asserted by the party whose standing is challenged and to the type of question he wishes to have adjudicated . . . Such inquiries into the nexus between the status asserted by the litigant and the claim he presents are essential to assure that he is a proper and appropriate party to invoke federal judicial power. Thus our point of reference in this case [*Flast*] is the standing of individuals who assert only the status of federal taxpayers and who challenge the constitutionality of a federal program. Whether such individuals have standing to monitor that form of action turns on whether they can demonstrate the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements.

cise by Congress of the taxing and spending power conferred by Art. 1, §8." *Id.* at 104.[1]

The opinion of the court of appeals in the instant case recognized that *Flast* v. *Cohen, supra,* enunciated the modern law of federal taxpayer standing. *Americans United, supra* at 259. (A. 14). The appeals court, however, held that "[a]s enunciated in *Flast,* the doctrine of taxpayer standing was not meant to qualify the general standing requirement of a "personal stake in the outcome.' To the contrary, *Flast*'s purpose was to outline a limited set of circumstances in which an allegation of financial injury in the form of increased tax liability *by itself* might be considered an acceptable stake on which to predicate standing, quite apart from any allegation of individuated injury to other judicially cognizable interests." (Emphasis added.) *Id.* at 261. (A. 19). This Court has in *United States Parole Com'n.* v. *Geraghty,* 100 S.Ct. 1202, 1212 (1980) recently stated that "[t]he purpose of the 'personal stake' requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions."

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[1] In responding to Petitioner's interrogatories, Respondent Americans United said:

> Plaintiff claims that this donation of public property acquired from tax funds is a violation of the establishment clause of the First Amendment to the United States Constitution. The purpose of this lawsuit is to attempt to prevent a violation of the constitutional rights guaranteed under the establishment clause of the First Amendment to the United States Constitution and to prevent the violation of the principle of separation of church and state which are inherent in the First Amendment to the United States Constitution. This lawsuit will serve the function of providing for a "judicial determination of the question of whether the First Amendment has, in fact, been violated by the actions of Defendants, and will further provide a means of redress for such violations. (Answer of Plaintiff Americans United for Separation of Church and State to Interogatories of Defendant, Valley Forge Christian College, ¶20, App. 152).

The appeals court in analyzing the instant case and comparing it with *Flast* said that in contrast to the construction of the Plaintiffs' contentions in Flast, "the litigants here do allege injury in fact to an interest other than the economic interest they share as taxpayers. They claim that the challenged action injures their important concern in the separation of church and state and that this is within the zone of interests protected by the Establishment Clause of the First Amendment. Thus, their appeal squarely presents the novel and important question posed by Justice Fortas in *Flast,* which the Court did not reach and thus did not decide: whether 'the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for [standing to bring] this [kind of] challenge." *Americans United, supra* at 262. (A. 21-22).[4]

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[4] Mr. Justice Fortas in his concurring opinion in *Flast, supra* at 115-116 said:

> Because of this unique 'nexus' in my judgment, it is not far-fetched to recognize that a taxpayer has a special claim to status as a litigant in a case raising the 'establishment' issue. This special claim is enough, I think, to permit us to allow the suit coupled, as it is, with the interest which the taxpayer and all other citizens have in church-state issues. In terms of the structure and basic philosophy of our constitutional government, it would be difficult to point to any issue that has a more intimate, pervasive, and fundamental impact upon the life of the taxpayer—and upon the life of all citizens.
>
> Perhaps the vital interest of a citizen in the establishment issue, without reference to his taxpayer's status, would be acceptable as a basis for this challenge. We need not decide this. But certainly, I believe, we must recognize that our principle of judicial scrutiny of legislative acts which raise important constitutional questions requires that the issues here presented—the separation of church and state—which the Founding Fathers regarded as fundamental to our constitutional system—should be subject to judicial testing. This is not a question which we, if we are faithful to our trust, should consign to limbo, unacknowledged, unresolved, and undecided.
>
> On the other hand, the urgent necessities of this case and the precarious openings through which we find our way to confront it, do not demand that we open the door to a general assault upon exercises of the spending power. The status of taxpayer should not be accepted as a launching pad for an attack upon any target other than legislaion affecting the Establishment Clause.

This Court in *Flast* held that the Establishment Clause specifically limits the taxing and spending power conferred by Art. 1, §8 and added that "[w]hether the Constitution contains other specific limitations can be determined only in the context of future cases." *Flast, supra* at 105

Petitioners here would have the clock on the developing law of standing stop in 1968 with this Court's *Flast* ruling. They gloss over decisions of this Court in 1970, which, together with *Flast,* have basically reoriented the federal law of standing. See *United States Parole Com'n* v. *Geraghty, supra* at 1212, n.11.

In *Data Processing Serv. Organizations* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), the old test of "a recognized legal interest" was specifically rejected and was replaced by two new tests. The first, based on Article III, is whether there is "injury in fact, economic or otherwise." The second test is "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" *Data Processing Serv. Organizations* v. *Camp, supra* at 151-53.[6]

In *Data Processing* this Court, in seeking to apply its prudential consideration of standing, as apart from the "case" or"controversy" test, focused upon "the question of whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected by the statute or constitutional guarantee in question." *Id.* This was also the focus of the court of appeals in the instant case.[7] In *Data Processing* this Court appears to have made a

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[6] In the *Data Processing, supra* at 151, this Court said that "Generalizations about standing to sue are largely worthless."

[7] The Opinion of the court of appeals said:

> The modern law of standing set forth in *Data Processing* and *Barlow* and reaffirmed in the same words since, requires no more than an allegation that the challenged official action has caused the plaintiff 'injury in fact, economic or otherwise' to

special effort to instruct that "a spiritual stake in First Amendment values [is] sufficient to give standing to raise issues concerning the Establishment Clause." *Id.* at 154

In ruling for Respondents, the court of appeals distinguished the instant case from *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208 (1974) and *United States* v. *Richardson,* 418 U.S. 166 (1974), which appear to be based upon the inadequate nature of the plaintiff's alleged injury in fact. *Americans United, supra* at 263. (A. 24-27). The court of appeals noted that "plaintiffs here advance neither an abstract nor generalized complaint but set forth instead a particular and concrete injury to a right that is allegedly protected by the constitutional guarantee raised." *Id.* at 265. (A. 27).[8]

It is clear that Petitioners seek to hide behind the "standing" shield even though a Bible college has received substantial federal property purchased with tax monies. Petitioners would have this Court believe that it is the victim. It is not, for over four years a Bible college has used facilities which

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an interest 'arguably within the zone of interest to be protected or regulated by the statute or constitutional guarantee in question." Requiring 'injury in fact' insures that standing to sue is conferred only on individuals having a 'personal stake in the outcome' of a controversy, and not on those merely generalized or external preferences about its outcome.' *Americans United, supra* at 256. (A. 9).

[8] Judge Adams in the majority Opinion said:

Their [Plaintiffs] claim . . . is that the challenged transfer of governmental property to a religios institution seriously injures their individual and personal constitutional right of religious liberty and separation of church and state. Unlike the general limitations at issue in *Reservists* and *Richardson,* certain other constitutional provisions, such as the First Amendment, create legal rights in individuals. Yet, unless individuals claiming an encroachment of their legal rights have some recourse other than the political process for the vindication and protection of those rights, the proud claim that individual citizens have rights against the government may be emptied of significance. *Americans United, supra* at 265. (A. 27).

were to a large extend bought and paid for by the taxpayers of this nation and then handed over to the Bible colllege free of charge. Respondents, and others aggrieved by this unconstitutional action, are the real victims. It is significant that neither the Bible college nor the government denies that the constitutional wall of church-state separation has been breached. They implicitly say that no one can stop them from violating the Constitution, that no one can prevent this breach of the Establishment Clause.

The government apparently believes it has found a method by which it may funnel millions of dollars worth of valuable property to pervasively sectarian institutions with no one being able to object. Petitioners point out that "[u]ntil this lawsuit, the Federal Property Act had never been challenged in its 31 year history; none of the hundreds and hundreds of surplus property transfers to health and educational institutions (including those which were church-related) had ever been questioned." (Petition, p. 8-9). The other side of this sad commentary of governmental largesse to church institutions is found in the opinion of the court of appeals, which noted that "[s]ince the enactment of this Act, HEW has authorized more than 650, transfers of surplus government property to various religious institutions. The total fair market value of government property transferred to denominationally sponsored organizations during this period amounted to more than $25,700,000.00." *Americans United, supra* at 254. (A. 3).

Petitioners fail to reveal that the government giveaway of public property here attacked represents one of the largest surplus property transfers to any religious institution.

This whole concept advanced by Petitioners was rejected by the District of Columbia Circuit in *Allen* v. *Hickel*, 424 F.2d 944, 946 (D.C. Cir. 1970), which held, as did the Third Circuit in the present case, that "[t]he Supreme Court has recently made clear that standing to present claims founded on the Constitution. . .may stem from non-economic values

as well as economic values . . .[citations omitted]. The Court made it particularly clear that there is a readiness to find standing conferred by non-economic values in order to consider issues concerning the Establishment Clause and Free Exercise clause." Contrary to Petitioner's inference, the judgment of the Third Circuit is consistent, not out of step, with the ruling of the D.C. Circuit in the context of the specific type of question here before the Court.[9] The D.C. Circuit ruling in *Allen* v. *Hickel* has never been repudiated by that court.

THE PROPERTY TRANSFER IN THE INSTANT CASE CLEARLY VIOLATES THE ESTABLISHMENT CLAUSE

The Statement of Facts has set out in some detail the substantive facts of this case because this Court in *Flast* v. *Cohen, supra* at 83, pointed out that it is appropriate to examine the substantive issues involved to "determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. Standing can be discussed meaningfully only in the context of the precise contention of the parties.[10]

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[9] In *Allen* v. *Hickel, supra* at 946-47, which involved an action brought to enjoin construction and maintenance of a creche on federal parkland in connection with a Christmas pageant, the court said:

> In the present case we concluded that the issues under the Free Exercise and Establishment Clauses are presented by plaintiffs having standing, who present an injury, in the impairment of non-economic values, having a personal stake in the outcome of the controversy,' as contrasted with mere airing of 'generalized grievances about the conduct of government.' An aspect of the case that underscores the standing of the plaintiffs is their allegation that the defendants are proposing to devote Government park property to uses inconsistent with the Free Exercise and Establishment Clauses."

[10] One commentator has suggested that standing should not be treated as a threshold issue, but rather should be viewed as a com-

In this case Respondents contend that the transfer of real and personal property to the Bible college violates the Establishment Clause of the First Amendment and is an unconstitutional application of federal law because it permits the use of assets paid for by taxes for religious purposes and also creates impermissible entanglement.

In this case it is clear that tax funds were used to acquire the property in question: Since 1942 more than ten million dollars of taxpayers' funds was used to improve and furnish the subject property so that the total acquisition costs of the facility totaled $10,374,386.00. (App. p. 203).

HEW determined that the current fair market value of this government property at the time of transfer was $1,307,730.00. (App. p. 203). The Bible college apparently agreed with the government that the real estate transferred had a fair market value of $577,500.00 as set out in the deed of transfer. (App. p. 276). The Bible college also agreed by executing the bill of sale that the personal property involved in the real estate transfer had a fair market value of $730,230.00 (App. pp. 276, 203).

What did the Bible college pay into the federal treasury for this valuable property? Not one cent, even though the Bible college admitted that the fair value was $1,307,730.00 and even though it stated in its application that the buildings were "easily adaptable to such use with a minimum of expense." (App. p. 255).

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ponent of a plaintiff's claim for relief since its resolution necessarily involves substantive issues such as injury, duty, and causation. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claims for Relief*, 83 Yale L.J. 425, 426-27 (1974).

The Petitioner argues that there was no outright gift of tax funds to a sectarian college. The Bible college agreed to operate in a manner whereby a "public benefit" would accrue from the use of the property by the Bible college. In other words, HEW agreed to deed the property to the Bible college, not for cash, but for educational benefits to be rendered to the public by the Bible college having at least a value equal to the fair market value of the real and personal property, that is $1,307,730.00.

But what did the government actually buy? HEW purchased a Bible college program designed for "born again Christians" and fashioned "to train leaders for church related ministries." The public benefit which the taxpayers of this nation are receiving in return for the transfer of public property worth $1,307,730.00 is composed of study designed only to train ministers, missionaries, and those engaged in various ministries of a church. It is an educational program designed for those who are willing to agree to attend Chapel and to accept thirty-five (35) Christian Service assignments, an educational program where graduation is dependent upon demonstration that the student evidences "soundness in church doctrine."

What did the Bible college receive from the government? It received a turn-key facility which with only a minimal outlay of cash was convertible to the Bible college's brand of sectarian education.

This aid to the Bible college was neither indirect nor incidental. More than $1.3 million worth of government property was given to this church-operated, pervasively sectarian, Bible college. This grant did not go to a college with an educational program similar to that found in *Hunt* v. *McNair,* 413 U.S. 734 (1973) and *Tilton* v.

Richardson, 403 U.S. 672 (1971). Rather it was made to a Bible college in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious purpose and the mission of the sponsoring church. This grant of property to the Bible college has the impermissible primary effect of advancing religion. *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975). Respondents cannot understand how it can be logically argued that the Establishment Clause is not a limitation on such governmental action.

THE CONTRACTUAL ARRANGEMENT BETWEEN HEW AND THE BIBLE COLLEGE CREATES IMPERMISSIBLE ENTANGLEMENT

The long-term contractual arrangement entered into between HEW and the Bible college also demands continued governmental contacts to insure enforcement. The deed requires the college to file reports with HEW on the operation and maintenance of the property with the possibility of reversion if a violation occurs. (App. p. 267). Similarly the bill of sale requires the property be used only as authorized for a period of five (5) years. (App. p. 305). Such a spectre of entanglement dictates that the contract entered into between HEW and the Bible college be struck down. *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664 (1970); *Lemon* v. *Kurtzman*, 431 U.S. 756 (1971); *Meek* v. *Pittenger*, *supra*; *Wolman* v. *Walter*, 433 U.S. 229 (1977); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979).

It is clear that religious indoctrination is a substantial purpose and activity of this Bible college. By that reason alone, there is a greater need for intensive government surveillance and resulting entanglement between government and religion. *Tilton* v. *Richardon*, *supra*.

THE CONTRACTUAL ARRANGEMENT BETWEEN THE GOVERNMENT AND THE BIBLE COLLEGE VIOLATES THE TEACHINGS OF *TILTON* v. *RICHARDSON*

The contractual arrangement between HEW and the Bible college is a clear violation of the teachings of *Tilton* v. *Richardson, supra.* In *Tilton,* this Court noted that an attempt has been made to insure that if a recipient institution had violated any statutory restrictions in the use of a federally financed facility, including its use for sectarian instruction or religious worship, the government had the authority to recover an amount equal to the projection of the facility's present value as the federal grant bore to its original cost. The Court, however, found that the provision was inadequate to take care of the constitutional problem because the remedy was available to the government only if the statutory condition was violated "within twenty years after the completion of construction." *Id.* at 683. The Court stated that "limiting the prohibition for religious use of the structure for 20 years obviously opens the facility to use for any purpose at the end of that period." *Id.* The Court made clear that it cannot assume that substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body if at the end of twenty years, the building is, for example, converted into a Chapel or otherwise used to promote religious interests. The original federal grant will in part have the effect of advancing religion. The Court held that this was a trespass on the religious clauses. In the instant case restrictions on the use of the property are equally deficient. (App. pp. 267-68, 305).

RESPONDENTS SHOULD HAVE AS MUCH STANDING HERE AS DID PLAINTIFFS IN FLAST

The courts have repeatedly held that what government is prohibited from doing directly, it shall not do indirectly.[11] It is clear that government is prohibited from making a direct appropriation for the purpose of setting up and furnishing a pervasively sectarian college. It may not do this indirectly by declaring that property obtained from and improved by treasury funds is surplus property. The individual Plaintiffs should have as much standing to challenge the latter as the former. This would at least approximate the same unconstitutional governmental action as financial grants made directly under the Taxing and Spending Clause of Article I, Section 8, of the Constitution. The Establishment Clause does not only limit the power of Congress under Article I, Section 8, but is a limitation on all of its powers.

A grant of tangible property purchased with tax funds and valued at $1.3 million should provide as much interest upon which to bottom standing as a cash grant of $1.3 million. The personal stake in the outcome

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[11] As stated in *School Dist.* v. *Schempp*, 374 U.S. 203, 229-30 (1963), Mr. Justice Douglas, concurring:

> The most effective way to establish an institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance religious schools. . . .
>
> Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; . . . it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that 'no law respecting the establishment of religion' shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.

of this suit would be no different. Any contrary outcome would be based upon a purely artificial distinction. Petitioners argue that Respondents have no standing and thus may not seek relief in the courts, instead Petitioners contend that Respondents are relegated to having their grievances redressed by political process.

Petitioners apparently fail to understand that as this Court said in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 638 (1943): "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

This Court recently held that "[t]he values enshrined in the First Amendment plainly rank high 'in the scale of our national values,'" *NLRB* v. *Catholic Bishop of Chicago, supra,* 99 S.Ct. at 1319. The religious clauses of the First Amendment hold a dominant position among the rights granted by the Constitution. Thus, when alleging such rights, the requirements of standing are satisfied when violations of such rights are alleged. Douglas, *The Bill of Rights Is Not Enough,* 38 N.Y.U. L. Rev. 206, 226-27 (1963). This Court has observed that effective enforcement of the Bill of Rights may require exceptions to the usual rights governing standing. *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

If the assertions of the Petitioners and the holding of the district court are correct, no one could prevent the transfer of any federal structure in the country to a church for worship purposes if the property first was

declared surplus under the Property Act or some similar federal law.[12]

This Court in *Walz, supra* at 669, emphatically declared that the Constitution will not tolerate an establishment of religion and recognized the importance of *chartering a judicial course* that avoided "any resemblance of established religion." This cannot be accomplished by the courts if no one is permitted to have standing to put the case to the court.

To say that no citizen has standing to obtain a judicial ruling on either the aid to religion or entangle-

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[12] Judge Adams, in the Opinion of the Court, *Americans United, supra* at 266, stated:

> One of the central purposes of judicial review is to restrain overreaching majorities from violating the rights of individuals that the Constitution was designed to protect. Yet, under the defendants' view, Congress could transfer to a particular religious organization such national facilities as the Naval Observatory or the Army War College, secure in the knowledge that any individual citizen attempting to challenge such action as an abridgement of his or her rights under the Establishment Clause would not even be granted standing to make the claim.

This concern of the court is not unlike that expressed in *Flast, supra* at 98, n.17

> The logic of the Government's argument would compel it to concede that a taxpayer would lack standing even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects. See *Flast* v. *Gardner*, D.C. 271 F.Supp. 1, 5 (1967) (dissenting opinion of Frankel, J.). The Government professes not to be bothered by such a result because it contends there might be individuals in society other than taxpayers who could evoke federal judicial power to challenge such unconstitutional appropriations. However, if as we conclude there are circumstances under which a taxpayer will be a proper and appropriate party to seek judicial review of federal statutes, the taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.

ment questions here raised would be to render the Establishment Clause of the First Amendment meaningless.

The injuries suffered by Respondents are of the gravest type. They have a First Amendment right to be free from governmental action that aids religion and thus infringes upon the Establishment Clause. Respondents have the constitutional right to live under a government that does not support a church or religion in general, where the state separates itself from the church and where intrusion into the precincts of one by the other is not permitted. *Lemon, supra* at 657.

To deny Respondents the right to sue would effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment, thus emasculating the Bill of Rights, which was designed to protect the minority against the excesses of government and the will of the majority. No greater injury could be alleged.

The federal action here attacked is not merely a regulatory activity. It is as much a program of federal assistance as any other federally financed educational program authorized by Congress.

The court of appeals, in its majority and concurring opinions, was faithful to the teachings of this Court in the applications of the legal principles regarding standing. It has rejected the wooden logic of Petitioners which seeks to still the effectiveness of the Establishment Clause whenever government violates that fun-

damental constitutional guarantee of religious freedom.[13]

Here the court of appeals, after fully reviewing the question of standing and applying pertinent principles, has determined that Respondents are proper parties to request adjudication of the issues here raised, and the appeals court has remanded the case for trial on the merits. No exceptional reason has been shown by Petitioners for review of the nonfinal judgment of the court of appeals at this time. *American Construction Co.* v. *Jacksonville, T. & K. Ry. Co.*, 148 U.S. 372, 384 (1893); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

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[13] Justice Brennan, concurring in *School Dist.* v. *Schempp*, *supra* at 256-257, presented his view of the individual right involved:

> It has also been suggested that the 'liberty' guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual . . . The fallacy in this contention, I think is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty.

CONCLUSION

For the reasons above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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